

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1926.

No. 447.

334

No. —, SPECIAL CALENDAR.

MAY COOPER AND HELEN SPENCER,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MAY 27, 1926.

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Court of Appeals of the District of Columbia

APRIL TERM, 1926.

No. 4475.

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THE UNITED STATES, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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INDEX.

	Original	Print
Caption	<i>a</i>	1
Indictment	1	1
Endorsement	1	2
Arraignment	2	2
Petition	2	3
Motion to suppress the use of property as evidence.....	4	4
Motion to enter order for delivery of property.....	5	5
Answer	5	5
Motion for return of property granted in part.....	7	6
Motion for bill of particulars.....	7	7
Motion for bill of particulars overruled.....	8	7
Memorandum: Verdict, guilty as to each defendant.....	8	7
Motion for new trial.....	8	7
Motion for new trial overruled; exception noted.....	10	9
Judgment; appeal noted.....	11	9
Memoranda: \$50 in cash deposited by T. M. Wampler in lieu of cost bond on appeal.....	11	10

	Original	Print
Bill of exceptions filed.....	11	10
Assignment of errors.....	12	10
Designation of record.....	13	11
Order making bill of exceptions part of record.....	14	12
Clerk's certificate.....	15	12
Notice of submission of bill of exceptions.....	16	13
Bill of exceptions.....	17	14
Testimony of Francis I. Dobson.....	17	14
Margaret Gillespie.....	18	15
Elsbeth Gillespie.....	19	16
Frank M. Howard.....	21	17
Harry G. Bower.....	22	18
William H. Sarton.....	22	18
Frank M. Howard.....	26	21
William H. Sarton.....	28	22
Prayers	29	23
Charge to jury.....	30	24

Court of Appeals of the District of Columbia

No. 4475.

MAY COOPER and HELEN SPENCER, Appellants,

vs.

THE UNITED STATES.

a Supreme Court of the District of Columbia.

Criminal. No. 42541.

UNITED STATES, Plaintiff,

vs.

MAY COOPER and HELEN SPENCER, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Indictment.*

Filed in Open Court November 6, 1924.

In the Supreme Court of the District of Columbia, Holding
a Criminal Term, October Term, A. D. 1924.

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in
and for the District of Columbia aforesaid, upon their oath,
do present:

That one May Cooper and one Helen Spencer, each late of the District of Columbia aforesaid, on, to wit, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-four, and at the District of Columbia aforesaid, three certain articles of wearing apparel for women commonly known as and called dresses, each of the value of thirty-five dollars, nine handkerchiefs, each of the value of one dollar, and five other handkerchiefs, each of the value of one dollar and twenty-five cents, of the goods, chattels and property of one Elsbeth Gillespie, then and there being found, feloniously did steal, take and carry away; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

PEYTON GORDON,
*Attorney of the United States in
and for the District of Columbia.*

(Endorsed:) Criminal. No. 42541. United States vs. May Cooper, Helen Spencer. Grand larceny. Witnesses:
Elsbeth Gillespie, Frances L. Dobson, William H.
2 Sarton, Jr., F. M. Howard, M. P., Margaret Gillespie. A true bill: George O. Vass, Foreman.

Supreme Court of the District of Columbia.

Saturday, November 15th, A. D. 1924.

The Court resumes its session pursuant to adjournment, Mr. Justice Siddons presiding.

* * * * *

Come as well the Attorney of the United States as the defendants in proper person, each according to her recognizance, and thereupon the defendants being arraigned upon the indictment, the reading whereof they specifically waive, plead not guilty each and for trial put themselves upon the country and the Attorney of the United States doth the like.

Filed December 3, 1924.

* * * * *

Petition.

The petitioners, Helen D. Spencer and Ella Cooper respectfully represent unto the Court as follows:

1. That they are citizens of the United States and residents of the District of Columbia.

2. That on the 6th day of October 1924, members of the Metropolitan Police Force of the District of Columbia, unlawfully and without any warrant or authority in law
3 searched the person and personal belongings of the petitioners. The petitioners had with them a hand bag or grip, and the said Police Officers forcibly and unlawfully opened and searched the same and took the contents thereof from the petitioners. The petitioners allege that at the time they were so unlawfully and with violence searched by the said officers as aforesaid, they were not under arrest and there was no charge of the violation of any law pending against them, and that the said search was without any warrant or authority in law, and was in violation of their rights under the Constitution of the United States.

3. Petitioners further allege that on the 6th day of October 1924, Police Officers, Members of the Metropolitan Police Force of the District of Columbia, unlawfully and without any warrant or authority in law whatsoever, forcibly entered Apartment 62, 1915 16th Street, which is and was the dwelling of the petitioners, and was their home and place of abode, and the said officers unlawfully and without authority in law, searched the said premises and unlawfully took therefrom, clothing and personal effects of the petitioners, without any warrant or authority in law in violation of their rights under the Constitution of the United States.

Wherefore the petitioners pray that an order may be entered herein directing Daniel W. Sullivan, Major and Superintendent of Police of the District of Columbia, E. B. Hesse, Property Clerk of the District of Columbia, and any

other officers of the Police Force of the District of Columbia, or officers of the United States, who may be in possession of the said property of the petitioners so taken
 4 from them as aforesaid to forthwith return the same to the petitioners.

HELEN D. SPENCER.
 ELLA COOPER.

T. MORRIS WAMPLER,
Attorney for Petitioners.

DISTRICT OF COLUMBIA, ss:

Helen D. Spencer and Ella Cooper, being first duly sworn made oath that the allegations and statements contained in the foregoing petition are true to the best of their knowledge, information and belief.

HELEN D. SPENCER.
 ELLA COOPER.

Subscribed and sworn to before me this 13th day of October 1924.

[SEAL.]

BERTHA G. HUNT,
Notary Public, D. C.

Motion to Suppress the Use of Property as Evidence.

Filed December 3, 1924.

* * * * *

Now come the defendants, Helen Spencer and May Cooper and move the court to suppress the use as evidence before the petty jury of the District of Columbia, of any of the property of the said Spencer and Cooper seized by officers of the Police Department of the District of Columbia from their person and from their dwelling, on the 6th day of October 1924, because the same was unlawfully seized and the use of the same before the grand jury would
 5 be in violation of the rights of the defendants under the Constitution of the United States.

T. MORRIS WAMPLER,
Attorney for Defendants.

Motion to Enter Order for Delivery of Property.

Filed December 3, 1924.

* * * * *

Now come the defendants, Helen Spencer and May Cooper and move the Court to enter an order herein requiring and directing the delivery forthwith to them of the property set forth and mentioned in the petition filed herein.

T. MORRIS WAMPLER,
Attorney for Defendants.

Answer.

Filed February 12, 1925.

* * * * *

Comes now Peyton Gordon, United States Attorney in and for the District of Columbia, and for answer to the petition herein filed states:

1. Respondent admits the allegations of paragraph 1.
2. Respondent denies that members of the Metropolitan Police Force of the District of Columbia unlawfully and without any warrant or authority in law, searched the person or personal belongings of petitioners. Respondent admits that said Police Officers opened and searched and took the contents from a hand-bag or grip of petitioners. Respondent states that at the time of such search and seizure, petitioners were lawfully under arrest and that such search and seizure was made by authority of law and with the consent of both petitioners; and therefore respondent denies that said search was without any warrant or authority of law and denies that it was in violation of any constitutional rights of petitioners or either of them.
3. Respondent denies that upon October 6, 1924, Police Officers, members of the Metropolitan Police Force of the District of Columbia, unlawfully or without any warrant or authority, forcibly entered apartment 62, 1915 16th Street. Respondent avers that the premises mentioned, was the dwelling house of one Roy Spencer, the husband of peti-

tioner Helen Spencer, and that the petitioners Helen Spencer and May Cooper lived in such dwelling house with said Roy Spencer. And that on the said sixth day of October, 1924, said Police Officers, at the invitation and consent of said Roy Spencer, entered and searched said premises and took therefrom certain clothing and property which respondent denies was the property of petitioners or either of them.

Wherefore respondent prays that the petition herein be dismissed.

PEYTON GORDON,
*Attorney of the United States in
and for the District of Columbia.*

DISTRICT OF COLUMBIA, ss:

I, John W. Fihelly, being first duly sworn according to law, on oath depose and say, that I am an Assistant Attorney of the United States, in and for the District of Columbia; that I have read the foregoing answer subscribed by Peyton Gordon, United States Attorney in and for the District of Columbia, and know the contents thereof, and
7 that I verily believe the statements of fact therein contained to be true.

JOHN W. FIELLY.

Subscribed and sworn to before me, this 12th day of February A. D. 1925.

[SEAL.] J. V. CONNOLLY,
Notary Public D. C.

Supreme Court of the District of Columbia.

Friday, March 6th, A. D. 1925.

The Court resumes its session pursuant to adjournment, Mr. Justice Hoehling presiding.

* * * * *

Come as well the Attorney of the United States as the defendants by their attorney T. M. Wampler, Esquire; whereupon the defendants' petition for return of property coming on to be heard, is argued and by the Court granted

as to the articles taken from apartment but is by the Court overruled as to articles taken from petitioners at the Station House.

Motion for Bill of Particulars.

Filed March 23, 1925.

* * * * *

Come now the defendants and move the court to require the Government to file a bill of particulars herein particularly specifying, describing and identifying each piece of personal property referred to in the indictment herein.

T. M. WAMPLER,
G.,
Attorney for Defendants.

8 Supreme Court of the District of Columbia.

Saturday, November 14", A. D. 1925.

The Court resumes its session pursuant to adjournment, Mr. Justice Bailey presiding.

* * * * *

Now comes here the Attorney of the United States and thereupon the defendants' motion for a Bill of Particulars coming on to be heard is by the Court overruled.

Memorandum.

January 12, 1926.—Verdict guilty as to each defendant.

Motion for New Trial.

Filed January 13, 1926.

* * * * *

Now comes the defendants and moves the court to set aside the verdict of the jury herein, and to award them a new trial for the following reasons.

1. Because the verdict of the jury is contrary to the evidence.

2. Because the verdict of the jury is contrary to law.

3. Because of error committed in the reception of evidence over the objection of the defendants.

4. Because of error committed in permitting the witness Howard to relate conversations had with Mrs. Abbey and the witness Sothan, which conversations were not in the presence of the defendants.

9 5. Because of error committed in submitting to the jury the question of the lawfulness of the arrest.

6. Because of the refusal of the court to hear the testimony of the witness Howard in regard to information received by him out of the presence of the jury.

7. Because the court should have heard the testimony of the witness Howard respecting information alleged to have been received by him, and the court should have determined as a matter of law, the lawfulness of the arrest.

8. Because of error in admitting in evidence the personal property, Exhibits 1-2-3-4.

9. Because the government should have been required to prove as a condition precedent to the admission in evidence of Exhibits 1-2-3 and 4, that they were not part of the property seized at the apartment of the defendants.

10. Because of error in permitting the witness Howard to give testimony respecting articles taken from Green's Store because said articles were a part of the property seized in the apartment and their use in evidence was suppressed by order of court.

11. Because of error committed in receiving in evidence against the defendants, property which was seized in violation of their constitutional rights.

12. Because of the refusal of the court to charge that the jury must find the value of the property received in evidence to be nominal because there was no legal proof as to value.

13. Because of error committed in reopening the case and permitting the government to introduce further evidence after the government had announced its case closed, and after counsel for defendants had argued a motion to exclude as evidence Exhibits 1-2-3 and 4.

14. Because of errors committed by the court in its charge to the jury.

15. Because of other errors to be fully stated upon the hearing of this motion.

T. MORRIS WAMPLER,
Attorney for Defendants.

Copy of above motion served on me this 13th day of January, 1926.

PEYTON GORDON,
C. B. M.,
U. S. Attorney.

Supreme Court of the District of Columbia.

Friday, January 22", A. D. 1926.

The Court resumes its session pursuant to adjournment, Mr. Justice Bailey, presiding.

* * * * *

Come as well the Attorney of the United States, as the defendants in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by their attorneys Messrs. Wampler and Lynch; and thereupon the defendants' motion for a new trial coming on to be heard, after argument by the counsel is by the Court overruled, to which action of the Court the defendants by their attorneys pray an exception which is noted; and thereupon it is demanded of the defendants what further they have to say why the sentence of the law should not be pronounced against them and they say nothing except as they have already said; whereupon it is considered by the Court that for her said offense, each of the said defendants be taken by the Superintendent aforesaid, to the Asylum and Jail aforesaid, whence she came, thence to the Penitentiary as designated by the Attorney General of the United States, there to be imprisoned for the period of Three (3) Years, to take effect from and including date of arrival of said defendant at said Penitentiary; and thereupon each defendant by her attorneys notes an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the Court fixes the amount of Bond for costs on appeal at One Hundred Dollars or Fifty Dollars in Cash, and the

Bond for the appearance of each defendant at Three Thousand (\$3,000.00) Dollars; whereupon the defendant May Cooper enters into a recognizance in the sum of Three Thousand (\$3,000.00) Dollars, with R. C. Talty as surety, to forthwith surrender herself to the custody of the Marshal of the District to be dealt with and proceeded against according to law in case the judgment appealed from shall be affirmed, or the appeal for any cause dismissed, or the judgment be reversed and a new trial ordered, or if she, the said defendant, depart the Court without leave.

Memoranda.

February 11, 1926.—\$50 in cash deposited by T. M. Wampler in lieu of cost bond on appeal.

February 13, 1926.—Bill of Exceptions filed.

12 *Assignment of Errors.*

Filed February 16, 1926.

* * * * *

Now come the defendants and assign as error committed by the trial court herein the following:

1. Overruling the motion for bill of particulars.
2. Error committed in the admission of evidence over the objection of the defendants.
3. Overruling motion for directed verdict.
4. Error committed in permitting the witnesses Howard and Sarton to give hearsay testimony.
5. Error in reopening case on motion of the government, and the admission of evidence by the witnesses Frank M. Howard and William H. Sarton.
6. Error committed in receiving the evidence of the witnesses Sarton and Howard after case was reopened in the hearing of the jury.
7. Because of error in submitting to the jury the question of the lawfulness of the arrest.
8. Because of the refusal of the court to hear the testimony of the witnesses Howard and Sarton, upon the case being reopened out of the presence of the jury.

9. Because of error committed in receiving in evidence property seized in violation of the constitutional rights of the defendants.

10. Because of error in refusing to charge the jury that they must find the value of the property received in evidence to be nominal because there was no proof as to value.

11. Error committed by the court in its charge to the jury.

13 12. Refusal to grant instruction No. 1.

13. Refusal to grant defendants instruction No. 2.

T. MORRIS WAMPLER,
Attorney for Defendants.

Service of a copy of the above is acknowledged this 16th day of February 1926.

PEYTON GORDON,
By W. M. SHEA.

Designation of Record.

Filed February 16, 1926.

* * * * *

The Clerk of the Supreme Court will please prepare transcript of record upon the appeal of the defendants herein, and the following papers are hereby designated to be copied.

1. The indictment.
2. The petition filed December 2nd, 1924.
3. The answer to the petition.
4. The two motions filed December 2nd, 1924.
5. The judgment of the court upon the petition and motions.
6. Motion for new trial.
7. The plea.
8. The motion for bill of particulars.
9. Memo; Verdict of the Jury.
10. The judgment.
11. Memo. Appeal noted in open court.
12. Memo. Appeal bond approved and filed.

13. Bill of exceptions.

14. Assignment of errors.

15. This designation.

T. M. WAMPLER,
Attorney for Defendants.

Service of a copy of the above is hereby acknowledged
this 16th day of February 1926.

PEYTON GORDON,
By W. M. SHEA.

Supreme Court of the District of Columbia.

Saturday, April 10", A. D. 1926.

The Court resumes its session pursuant to adjournment,
Mr. Justice Bailey, presiding.

* * * * *

Now come here the defendants by their attorney T. M. Wampler, Esquire, and pray the Court to sign, and make a part of the record, their Bill of Exceptions taken during the trial of the case and filed with the Court on *on* February 13, 1926, which is accordingly done.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Criminal Cause No. 42541, wherein United States is Plaintiff and May Cooper and Helen Spencer are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of April, 1926.

[Seal of Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

16 In the Supreme Court of the District of Columbia

Criminal. No. 42541.

UNITED STATES

VS.

MAY COOPER, HELEN SPENCER.

Notice.

To Honorable Peyton Gordon,
U. S. Attorney for the D. C.:

Please take notice that I have this day filed with the Clerk of the Supreme Court of the District of Columbia the bill of exceptions herein, and that I will submit the same to the court for settlement, on the 20th day of March 1926.

T. MORRIS WAMPLER,
Attorney for Defendants.

Service of a copy of the foregoing notice, together with a copy of the bill of exceptions therein referred to, is acknowledged this 13th day of February 1926.

PEYTON GORDON,
U. S. Attorney, D. C.
By RAYMOND NEUDECKER,
Assistant U. S. Attorney.

Submitted Mar. 20th, 1926.
JENNINGS BAILEY,
Justice.

17 In the Supreme Court of the District of Columbia

Criminal. No. 42541.

UNITED STATES

VS.

MAY COOPER, HELEN SPENCER.

Bill of Exceptions.

Be it remembered that upon the trial of this case, the following testimony was adduced, the following proceedings were had.

To maintain the issue upon its part joined, the Government introduced the following witnesses who testified as follows:

Frances I. Dobson: That she is a clerk for Elsbeth Gillespie and was such on October 6, 1924, she recalls having worked on that day, and knew the defendants by sight; saw the defendants on October 6, 1924, in the shop of Mrs. Elsbeth Gillespie at 1315 Conn. Ave., in the District of Columbia, between four thirty and five o'clock P. M. The defendants entered the shop, and approached the witness and asked to see children's dresses; the witness took them to the back part of the shop and started to show them children's dresses, whereupon one of them complained about feeling ill, it being Helen Spencer, and she walked to the front part of the store where the witness could not see her, the witness continuing to show the other children dresses. In about a minute or two she returned from the front part of the shop into view, and asked the other to please hurry, that she was going outside and would wait for her. She went to the front part of the shop and went out. About this time the other defendant said that she did not see what she wanted, and left the shop. The witness, with

18 Mrs. Gillespie, went to a closet near the front of the shop and there were three empty hangers on the door; they were in a wooden case with doors, sliding doors made of board; the door was open. At the time the defendants entered the store the door to the closet was closed, and the hangers were not empty when they came into the shop.

Thereupon the witness was shown a dress, and asked to examine it, thereupon defendant's counsel objected, because there is no search warrant in this case, and the defendants have challenged the right to make the search and seizure. The court overruled the objection of the defendant, to which exception was duly reserved. Thereupon the witness over the objection and exception of the defendant was permitted to testify that she was able to identify the dress shown her, and had seen it before in Mrs. Gillespie's shop, saw it there on October 6, 1924, whereupon the said dress was marked for identification Exhibit No. 1. Thereupon the witness was shown two other dresses, and gave similar testimony with respect to them. Thereupon the witness was handed an envelope, and asked if she could identify the contents thereof, and over the objection and exception of the defendant, she testified that she could, and had seen the contents in Mrs. Gillespie's shop on October 6, 1924, and thereupon the envelope was marked for identification as Government's Exhibit No. 4. Thereupon the witness gave testimony that the dresses which had theretofore been shown her bore a label when in the store of Mrs. Gillespie's store. Subsequently to the last time the witness saw the dresses in the store, she saw them at the second precinct on October 7th, 1924, and over the objection and exception of the defendant, she was permitted to testify that the dresses when she looked at them at the Police Station did not have the labels on them.

Margaret Gillespie: She is the daughter of Mrs. 19 Elsbeth Gillespie, and is a manufacturer of women's and misses' dresses, and had been in this business for sometime, and thereupon there was handed to the witness the dresses previously identified by Miss Dobson, and the witness testified that they were made in her factory, and were sold to her mother Mrs. Elizabeth Gillespie. With respect to Government's exhibit No. 1, (a dress) asked what its value was, the witness testified that she sold it to her mother a long time ago, and did not know what her mother sold it for, would have to look up to determine what the witness sold it for "possibly about \$35, but I could not swear to that."

With respect to Government's exhibit No. 2, (a dress) the witness testified that this was made in her factory, that

it was sold to her mother, Mrs. Elsbeth Gillespie, asked as to the value of this dress, the witness testified, "I could not swear to that, it was so long since I sold it, but I should judge around \$30 or \$35." That subsequent to the time the witness sold the dresses to her mother, she was called by the Police, and saw them at the second precinct.

On cross examination the witness testified that her statement with respect to the value of the exhibits shown her was merely a speculation because it was so long ago since she sold them that she did not remember the sale price or even the cost price of them. Upon being asked if she meant by the valuation placed upon the exhibits, she meant the market value, the witness testified "what they are worth to me. I could say definitely it is not under what I said; it might be more."

Elsbeth Gillespie: That she is the proprietor of a shop on Conn. Ave., and maintained the same on October 6, 1924, and gave substantially the same testimony as the preceding witness, with respect to the presence in the store of one of the defendants, and the dresses being missing after they left. The witness identified Government's Exhibit
20 No. 1 as being one of the garments which was in the shop of the witness, in the case near the front of the shop; that it belonged to the witness; the witness gave the same testimony with respect to Government's exhibit No. 2, and No. 3 as well as the envelope marked for identification Exhibit No. 4, and identified its contents as being handkerchiefs which were in the shop of the witness and belonged to her. The witness gave testimony that the three dresses, Government's exhibits Nos. 1, 2, and 3, and the handkerchiefs Government Exhibit No. 4 were in her shop before one of the defendant's came in, and they were not there after one of the defendants had left, identifying defendant Helen Cooper, and that all of the said property belonged to her. The dresses had a lable on them, and the witness again saw them at No. 2 Precinct the next morning, and at that time they had no lable upon them.

Upon cross examination the witness testified that at no time on October 6, 1924, did she see the defendant Spencer in her store. The witness testified that the value she placed on Exhibit No. 1 \$39.50, she meant that that is the amount that it cost the witness, and with respect to Exhibit No. 2

\$29.50, the witness testified that that is what it cost her. With respect to exhibit No. 3, \$35. the witness testified it cost her that sum. With respect to the handkerchiefs, Government Exhibit No. 4, five handkerchiefs at \$1.25 and nine at \$1.00, the witness testified that that was the amount of money she paid for them, and that all of the said property the witness bought outright, and paid the above sums to her daughter who made them. She said she bought the handkerchiefs from a Mrs. Jack Hayes.

On redirect examination, the witness testified that the selling price of Government's Exhibit No. 1 was \$65.; the selling price of Government's Exhibit No. 2 was \$49.50; the selling price for Government's Exhibit No. 3 was \$45.

21 **Frank M. Howard:** That he is a detective attached to No. 2 Precinct, knows the defendants, and saw them on October 6, 1924, late in the evening, around 6 o'clock at a cafeteria on 18th street, just north of Vernon; at the time the witness saw the defendants, there was present with him J. W. Green, a young man by the name of Sarton, a police officer Broderick. Just as the defendants came out of the door of the cafeteria, the witness placed them under arrest, and took them to number 2 police station in a taxicab. The defendants had with them a dress suit case; the defendant Cooper had the suit case in her hand when she came out of the cafeteria, and that was taken with the defendants to the police station. At the police station, the suit case was opened by the witness, after permission having been given by defendant Helen Cooper and over the objection and exception of the defendant, the witness was permitted to testify that there was in the suit case a number of ladies wearing apparel, cosmetics and imitation jewelry. The witness identified Government's Exhibit Nos. 1-2-3, as being dresses taken by him from the suit case at the police station, and that there were no labels on them. The witness identified the contents of the envelope marked for identification No. 4, as having been taken from the suit case. As the defendants came from the cafeteria, the witness said, "girls, we want you to the station," the witness would not say whether he used the words "you are under arrest," that his recollection was not clear, the witness did not put his hands on them, but walked up to them, "girls we want you to the station" and escorted them to the taxi-

cab standing at the curb and got into it with them. When asked whether or not the witness had testified during the last fall, before Mr. Justice Hoehling, that immediately as the defendants came through the door, he took the grip out of their hands, the witness replied "I don't remember,"

and upon being asked "but do you deny that you
22 gave that testimony, answered "no, I don't know."

When the witness took the suit case into his hands, the defendants were on the sidewalk and had not gotten into the taxicab, and it was the witness who actually put the suit case into the taxicab, and thereupon the following question was asked and answer made:

"Q. Now, do you deny that you testified before Mr. Justice Hoehling, when a matter in connection with this was heard, that immediately upon their coming through the door, you took hold of the suit case and took it out of her hand and then escorted them to the taxicab? Do you deny that you gave that testimony? A. I have not denied it.

"Q. And you do not deny it, do you? A. I don't deny that, no, sir."

Harry G. Bower: That he is a police officer and in October 1924 was attached to No. 2 Precinct, and knew that he knows the defendants, and saw them on October 6, 1924 at No. 2 Police Station. The witness was present at the Police Station when Officer Howard opened the suit case and examined the contents. The witness identified Government's Exhibits No. 1, 2, 3, and 4 as having been taken from the suit case at the Police Station, and testified that at that time there were no labels upon the dresses. Whereupon Gov't Exhibits 1, 2, 3 and 4 for identification were offered in evidence by counsel for the Government and counsel for the defense then requested that ruling be deferred until the close of the Government's case.

William H. Sarton: In October 1924, he was a taxi driver for the Black and White Taxi Company, and on that day he went to the apartment 1915 16th St. where the defendants entered his cab and ordered the witness to drive to the golf links in Potomac Park and there discharged a passenger, a man who was riding with them and then take

them back to the city. Upon entering the cab the defendants had with them a suit case, and upon leaving the
23 speedway, the witness drove to Mays Store, dry goods store located at 8th and Market Place where the witness waited for the defendants ten or fifteen minutes, the defendants did not take the suit case with them, later returning to the cab and were driven to Oppenheimer's at 8th and E Streets, N. W. a dry goods store. The defendants then left the cab and entered the store, did not take the suit case with them, returned to the cab in ten or fifteen minutes and were driven to the People's Drug store, which testimony was given over the objection and exception of the defendants; that they were driven to the People's Drug store at 10th and F Sts., and over the objection and exceptions of the defendants, the witness was permitted to testify that they left the cab at that place, had the driver wait for them about ten minutes, returned to the cab, and went from there to Ligget's Drug Store at 12th and G Sts. N. W., left the cab there for a few minutes, returning, went to Green's Store at 14th and Thomas Circle, all of which testimony was given over the objection and exception of the defendants, and under like exception the witness was permitted to continue, that Green's Store is a ladies clothing store, wearing apparel, there one of the defendants, Helen Spencer, got out, the other remained in the cab. Helen Spencer went on the sidewalk, got immediately back to the cab and they were driven off. They went from there to Gillespie's store on Conn. Ave. When they stopped in front of Oppenheimer's, the witness saw into the suit case which was open, and it contained nothing except an empty bottle. The witness was told when to stop on Conn. Ave., near Gillespie's shop, and both of the defendants left the cab and entered the store, did not take the suit case with
24 them. They were gone 15 or 20 minutes, when Helen Spencer came out first, she entered the cab and had the witness drive up the street a little ways where he could park. After waiting for about five minutes, the witness drove around the block, and the other defendant came out of the store and got into the cab; and he further stated that one of the two of them told me to beat it—drive anywhere; defendants were then driven out 14th street to the Baby Shop, 14th street above Clifton where the cab

was stopped, the witness waited for the defendants who returned to the cab and had the witness drive to the Lingerie Shop on 14th Street just beyond Kenyon. The defendants were in this shop for about 20 minutes when they both returned and had the witness drive to a cafeteria on 18th street, where the defendants left the cab, paid the witness, taking the suit case with them. The witness took suit case from cab and it felt as if it had something in it. Immediately after the witness left the defendants, he was told to report to the garage, and there he saw officer Howard, and took officer Howard with him back to the cafeteria where he had left the defendants. And thereupon the Government renewed its offer in evidence of Government's Exhibits Nos. 1, 2, 3, 4, and 5 for identification, to the reception of which exhibits in evidence, the defendants duly objected. That after the defendants counsel had argued at length his objection to the reception in evidence of the exhibits, the following occurred:

"The Court (addressing counsel for the Government): If you propose to offer further evidence, I will consider the offer after luncheon.

"Mr. Fihelly: We will offer further evidence."

25 "The Court: Proceed, gentlemen.

"Mr. Collins: May we approach the bench at this time, your Honor.

(Counsel for the Government and defendants thereupon approached the bench and the following took place out of the hearing of the jury:)

"The Court: I sustain the objection to the evidence so far as it is at present offered.

"Mr. Collins: On the ground that there was no probable cause?

"The Court: No cause whatever.

"Mr. Collins: We propose to show the reason for the police arresting her. I will make this suggestion: The reason we did not do it before was because it involves another transaction independent of this one.

"The Court: Very well. Proceed with the evidence.

"Mr. Wampler: His present offer amounts to asking your Honor to reopen the case after the case has been closed.

“The Court: There has been no evidence offered on behalf of the defendant. I would prefer that you state what you expect to prove first.

“Mr. Fihelly: Succinctly it is this: We expect to show that on a prior date, possibly a week before October 6th, a complaint had been made as to two people answering to the identification of the defendants having stolen some articles of wearing apparel from Green's. The report was made by Mrs. Albee who was present when the articles were stolen. Your Honor will recall the testimony with respect to these defendants stopping at Green's Store. The evidence will show that Mrs. Albee reported the hour that these two came to the store on this day, got into the taxi, which she saw was No. 35 and proceeded away. She
26 immediately called detective Howard and said, “The same two girls are up in Taxi 35 and just left the store.” Howard went to the taxicab company and found out the number of Taxi 35 and talked to Sarton, who gave him all the evidence which he has given here on the stand today, and he went up to the restaurant at 18th and Columbia Road. We have the statement of Mrs. Albee and the statement of Mr. Sarton.

“The Court: I think that is sufficient. I will reopen the case.

“Mr. Collins: Does your Honor want that done in the presence of the jury?

“The Court: It is part of the evidence in this case.”

And thereupon **Frank M. Howard** was recalled to the witness stand, and over the objection and exception of the defendants, testified that on October 6, 1924, the day he arrested the defendants, he knew a Mrs. Albee, he saw her on that day, and had a conversation with her at the
27 Black and White taxi garage late in the evening, in the neighborhood of 5:30 or 6, before he arrested the defendants, and the witness was thereupon asked to tell the conversation, to which objection was duly made, but the court overruled the objection and permitted the witness to testify, to which ruling of the court the defendant duly noted an exception. And thereupon the witness testified, in the presence and hearing of the jury, that he was informed by Mrs. Albee that the two women he was looking for were in taxicab No. 35 a Black and White. She identi-

fied them. They stopped in front of her store and one attempted to come into the store and turned around, laughed and got back into the cab. Within five or ten minutes the witness Sarton drove up in his cab at the garage, and the witness testified he had a conversation with Sarton, and upon being asked to give the conversation, objection was duly and timely made, overruled, and under exception, the witness was permitted to testify that he asked Sarton if he had two women passengers, and he said yes. He asked him where he had left them and Sarton told the witness at the cafeteria on 18th St., and the witness then directed Sarton "take me right over there to where they are." Over the objection and exception of the defendants, the witness was permitted to testify, that Mrs. Albee, when neither one of the defendants were present, stated to him that the two women that the witness was looking for for larceny of dresses from J. W. Green's Store had passed, had passed at her store and had then gone into a taxicab, one got out and then went on in a taxicab, that she was positive of her identification. The dresses involved in the J. W. Green matter amounted to about —. The dresses that were stolen while she was employed were two. Prior to her employment there, we were talking also on the subject of about
28 fifty dresses, thirty-eight dresses it was, and I asked her about what was the value of those dresses but she said she could not give the wholesale cost of them, but that they averaged about fifty dollars a piece. She said the same two women that took the two dresses out of her store, were the two that were in the taxicab that evening Taxicab 35 of the Black and White Taxi Co.

On cross examination the witness testified that neither one of the defendants were present at the time he had the conversation with Mrs. Albee, nor was either one present when he had the conversation with Sarton. At the time of the said conversations, the witness had no warrant for the arrest of either of the defendants.

William H. Sarton testified that the taxicab he was driving when the two defendants were passengers in his cab, was cab No. 35.

Thereupon the District Attorney renewed his offer in evidence of Government's Exhibit Nos. one to five inclusive,

to which defendants duly objected but the court overruled the objection, and to which ruling of the court the defendant duly noted an exception.

And thereupon the Government again announced its case in chief closed.

And thereupon the defendants moved the court to direct a verdict of not guilty in their favor, because a proper foundation had not been laid to warrant the acceptance of the exhibits in evidence, because no justification had been shown, the search and seizure having been challenged, and the duty devolved upon the Government to show its right to make the search and seizure, and thereupon the defendants offered to prove, that the dresses referred to by the witness Howard, as having come from Green's, were a part

29 of the personal property seized in the apartment of the defendants, regarding which Mr. Justice Hoehling held that no evidence in respect thereto could be given and suppressed all evidence with respect thereto and granted the petition for its return, but the court overruled the said motion and offer of the defendants, to which ruling of the court the defendants duly noted an exception. And thereupon the defendants further moved the Court to direct a verdict of not guilty, because there is no testimony that either one of the defendants had ever been placed under arrest, there being no testimony that the defendants were arrested before the suit case came into the possession of the officer, and because the seizure of the same was unlawful, which motion the court overruled and to which ruling of the court the defendant duly noted an exception.

And thereupon the defendants moved the court to grant the following instructions to the jury;

Instruction No. 1.

The Court instructs the jury that if they believe from the evidence that the grip was taken from the defendant by Officer Howard, before the defendant was placed under arrest, the property contained in the grip is not admissible in evidence against the defendant, and their verdict must be not guilty.

But the court overruled the said motion, refused to grant the said instruction, and to which ruling of the court the defendant duly noted an exception.

“Instruction No. 2.

The Court instructs the jury that if they have a reasonable doubt as to whether or not the grip was seized before the defendant was placed under arrest, their verdict must be not guilty.

30 But the court overruled the said motion, refused to grant the said instruction, and to which ruling of the court the defendant duly noted an exception.

And thereupon the defendants moved the court to instruct the jury that if they found the defendants guilty that they should find that the property was of nominal value, because there had been no legal proof of value, but the court overruled the said motion, and to which ruling of the court the defendant duly noted an exception.

And thereupon the court charged the jury as follows:

“Charge to the Jury.

The Court (Mr. Justice BAILEY): Gentlemen of the jury, the defendants here, May Cooper and Helen Spencer, have been indicted for grand larceny; that is, for the theft of property whose value is in excess of \$35.00.

As in all criminal cases, the defendants are presumed to be innocent, and the Government must prove their guilt beyond a reasonable doubt; that is, such a doubt as you as reasonable men after thoroughly considering the evidence may have.

There have been introduced into evidence certain articles claimed to be the property stolen, and which it is testified came from a suitcase which the defendants or one of them had in their possession as they left a certain cafeteria. Gentlemen, the law is, in the first place, that an officer of the law must have some reason for making an arrest. If he has reasonable grounds to believe a felony has been committed, he may arrest anyone whom he suspects, upon grounds, to be the guilty party. It is for that purpose that I have admitted evidence in this case as to conversations between officer Howard and Mrs. Albee and the taxicab driver as showing his reasons for making this arrest.

You cannot consider those conversations for any other purpose whatever, except as showing his suspicions

31 as a ground for making this particular arrest. They are not evidence of any fact before you except as grounds for his suspicion, and you cannot consider them as bearing upon the guilt or innocence of these defendants. That question is important in this case, for the reason that this suitcase, according to the testimony of the officer and others, was opened after the parties arrived at Precinct No. 2, I believe it was, and the testimony is that these articles were taken from that suit case.

An officer cannot before putting anyone under arrest seize any of his property or search him. After his arrest, if he has arrested him upon proper grounds he does have the right to search him and to seize property in his immediate possession. That is the reason I have admitted this testimony.

If you find that this officer, Officer Howard, took this suitcase away from the defendants with the intention of depriving them of it and of searching it, before he made the arrest, then you cannot consider this testimony at all, and in such case there would not be sufficient evidence upon which you could convict the defendants. But if he merely took it in order to assist the defendants into the taxicab and put it in the taxicab with them without any intention of taking the possession away from them, then what I have said does not apply. In any event, as I said, if he took it from them for the purpose of depriving them of it or searching it before he made the arrest, you cannot consider that testimony.

Under our law a defendant may testify or not as they deem best, and you cannot consider their failure to testify as in any manner an admission of guilt. You cannot consider it against them as far as the facts in the case are concerned. It is their right under the Constitution and you cannot consider, as I have said, their failure to testify as having any bearing on the case.

32 Is there a further request?

Mr. Fihelly: Would your Honor give the instruction as to aiding and abetting?

The Court: Yes. Gentlemen, it is immaterial if one defendant commits an actual theft and the other connives at it or aids and abets in the commission of the offense; they are both guilty under the law.

Your verdict of course may be guilty or not guilty as to one or both defendant as you may find.

Mr. Wampler: May it please your Honor, may we reserve an exception to your Honor's refusal to charge instructions Nos. 1 and 2, and to the refusal of these two instructions asked by the defendants before the argument? And may the record show that the defendants' counsel did not address the jury. We now note an exception to that part of your Honor's charge with respect to the conversation between Howard and Mrs. Albee and Sarton. We note an exception to that part of your Honor's charge with respect to the taking of the suitcase by the witness Howard to that part of your Honor's charge with respect to the arrest and the circumstances of it; and to that part of your Honor's charge wherein your Honor told the jury that his picking up the suitcase, if he took it with the intention of taking the possession thereof away from them; and to that part of the charge with respect to being an aider and abettor.

The Court: I might add to my charge, gentlemen, that if you have any reasonable doubt as to whether this suitcase was taken under the circumstances which I have already charged you before the arrest, your verdict should be not guilty.

Whereupon the Court said to counsel for the defense: Now, Mr. Wampler, if you wish to argue the case I will permit you to do so and recharge the jury.

Mr. Wampler: Your Honor gives me the privilege, since I have heard the charge, of arguing to the jury?

The Court: I will, yes.

Mr. Wampler: Thank you, sir. And may I refer in my argument to parts of your Honor's charge as I heard it delivered to the jury?

The Court: Yes.

Mr. Wampler thereupon argued the case to the jury on the evidence on behalf of the defendants.

Mr. Fihelly thereupon made the closing argument to the jury on behalf of the United States.

* * * * *

"The Court: Gentlemen, I hardly see any necessity to give you any further charge, except to call your attention to a statement of the District Attorney which might give

33 a wrong impression. As I understood counsel, he stated that at the beginning of the trial the defendant- were presumed to be innocent. You might get the implication that that did not continue. That presumption of innocence continues throughout the trial until you have finally reached your verdict.

You may retire and consider your verdict.”

And the Court now certifies that the foregoing bill of exceptions contained the substance of all of the evidence introduced in the trial of this case and the proceedings had therein.

And the defendants now tender this their bill of exceptions herein, which they pray may be signed, sealed, enrolled and made a part of the record in this case nunc pro tunc, this 10th day of April 1926, which is accordingly done.

JENNINGS BAILEY, [SEAL.]
Justice

Endorsed on cover: District of Columbia Supreme Court. No. 4475. May Cooper and Helen Spencer, appellants, vs. the United States. Court of Appeals, District of Columbia. Filed May 27, 1926. Henry W. Hodges, clerk.

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No. 4475

In the Court of Appeals of the District of
Columbia

MAY COOPER, HELEN SPENCER, APPELLANTS

v.

UNITED STATES, APPELLEE

BRIEF ON BEHALF OF APPELLEE

PEYTON CORDON,

United States Attorney,

WILLIAM H. COLLINS,

Assistant United States Attorney.

In the Court of Appeals, District of Columbia

No. 4475

MAY COOPER, HELEN SPENCER, APPELLANTS

APPELLANTS

v.

UNITED STATES, APPELLEE

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from a conviction in the Supreme Court of the District of Columbia under an indictment charging May Cooper and Helen Spencer with the larceny of three dresses and fourteen handkerchiefs, the property of Elsbeth Gillespie, the proprietress of a women's apparel store on Connecticut Avenue, Washington, D. C.

Prior to the time of trial of this case, a preliminary petition and a motion were filed asking the Court to suppress the use of certain property as evidence and to return said property to the defendants. The petition and motion went to two

separate and distinct seizures of property by the police: One group being that taken from a suitcase carried by the defendants at the time of their arrest; the other group being property taken from the apartment in which the defendants resided.

After hearing, the court granted the motion and petition as to the property taken from the apartment, but overruled said motion and petition as to the property taken from the suitcase at the station house in the presence of the appellants when arrested. (R. 7.)

At the trial, notwithstanding the previous ruling of the court, strenuous objection was made to the introduction of the dresses and handkerchiefs, property which the testimony clearly showed was taken from the suitcase at the station house after the arrest of the defendants. It was again contended that the arrest was illegal.

Under the direction of the Court (R. 21) the Government offered evidence of the probable cause for arrest, and the court submitted that testimony to the jury for the purpose of permitting them to pass on its credibility; and in substance instructed the jury that if those facts were believed such would constitute probable cause, and also instructed the jury that that evidence was not admitted as any evidence of the guilt of the two defendants under the charge laid in the indictment, but was admitted only for the one purpose of passing on the question as to whether or not there was probable cause for the arrest of the two defendants.

No testimony was offered by way of defense, and after due deliberation the jury convicted both defendants.

ARGUMENT

Appellants in the record (p. 10) set forth thirteen (13) assignments of error, but in their brief (p. 2) have set forth only four assignments. The appellee will discuss the assignments in the order they were urged by appellants.

OVERRULING MOTION FOR BILL OF PARTICULARS

Appellants argue that after the court passed on the said preliminary petition and motion (R. 7), the court erred in refusing their motion for a bill of particulars.

The indictment in this case charges the offense of larceny in the usual and approved form, and fully advised the defendants as to the charge against them. It alleged that they did steal, take, and carry away a certain type of property known as and called dresses, of a certain value named belonging to a certain person, and, further, that this larceny was committed on a particular day. (Rec. p. 2.)

Appellants also say in their brief under this section (p. 3) that none of the property was ever returned to them as directed by the Court under the preliminary petition and motion.

It is immaterial to this case whether or not the property mentioned was returned, provided, as is the case the same was not used as evidence nor any attempt made to use it?

ADMISSION OF EVIDENCE

It is contended by appellants that the court erred in permitting Officer Howard to testify to conversations with Sarton, a taxicab driver, and Mrs. Albee, with respect to other and prior larcenies, for the purpose of showing probable cause justifying the arrest.

It will be noted that the Court (through another Justice) had previously ruled that the property taken from the suitcase at the station house subsequent to the arrest of the two defendants was legally seized. Appellants, however, through their counsel, persisted in challenging the use of this evidence, notwithstanding this prior ruling. (R. 20.) As suggested by the Court, after the strenuous objection of counsel for the appellants, and in speaking of this evidence which the Government had announced at the bench it could offer.

It is part of the evidence in this case. (R. 21.)

Further, the Court instructed the jury that this evidence was admitted for the sole purpose of showing probable cause for arresting the defendants and was not to be considered in any wise as evidence of their guilt in this case. (R. 24.)

This evidence, from a certain viewpoint, was hearsay; but, for the purpose that it was offered it was original evidence of the fact or facts upon which the officer acted in making the present arrest.

In the case of *Argetakis v. State*, 212 Pac., p. 372, in which case evidence of probable cause was offered under circumstances quite similar to this case, the Court said:

The best possible evidence concerning that was the testimony of the officer as to what he had heard and seen, whether what he had heard consisted of spoken words or of anything else. The ultimate test as to whether or not a statement is hearsay is whether the witness may be cross-examined concerning the fact about which he testifies. The question here was whether the officer had heard, and what he had heard. As to both those things, he was subject to cross-examination. He could not be cross-examined as to the truth of the information received; but that was not the fact to be proved. The basis of the officer's authority was not the truth of the charge, but the fact that the charge was made. It is not that the person sought to be arrested has committed the felony that is under consideration; but that the officer had reasonable cause for believing him to be the person who committed it. Paragraph 854, Penal Code of Arizona; *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054; *Lees v. Colgan*, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355.

See also *Carroll v. United States*, 267 U. S. 132; *Hopper v. State*, 236 S. W. 595; *Bushby v. State*, 230 S. W. 419; *People v. Cascia*, 181 N. Y. Supp. 855; *Wylie v. State*, 215 S. W. 593.

RECEIVING EVIDENCE OF HOWARD IN PRESENCE OF JURY

It is urged that the Court erred in receiving evidence of probable cause for the arrest in the presence of the jury.

Attention is again directed to the fact that the legality of the seizure of the articles in the suitcase at the station house had been passed upon preliminarily. Notwithstanding that ruling by the Court, persistent objection was interposed to the admission of the articles in evidence on the ground that they had been illegally seized. (R. 20.) This action of the defense at the trial made said evidence an issue and also made it admissible as well as necessary.

Government counsel announced at the bench what evidence could be offered to show probable cause (R. 21), whereupon the court said:

The COURT. I think that is sufficient; I will reopen the case.

Mr. COLLINS. Does Your Honor want that done in the presence of the jury?

The COURT. It is part of the evidence in this case. (R. 21.)

It is perfectly apparent from the above that the Court was satisfied that if the evidence announced at the bench in the presence of defense counsel could be proved, it would constitute probable cause, but was of the opinion that the credibility of that testimony was a question for the jury.

In 5 C. J. 419 it is stated:

The question of probable cause is a mixed question of law and fact; whether the facts alleged exist, is for the jury; whether they amount to probable cause is for the Court.

In *Stewart v. Sonneborn*, 98 U. S. 194, the Supreme Court said:

It is, therefore, generally the duty of the Court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause or that they do not.

In *Saunders v. Palmer*, 55 Fed. (C. C. A.) 220, the Court said:

Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. Upon the trial of an action for malicious prosecution, where the facts are in doubt or depend upon conflicting testimony, the question of probable cause is a mixed one, of law and fact, to be determined by the jury under the instructions of the Court. But if the facts are undisputed, or clearly established, it is for the judge to determine their legal effect, and direct the jury accordingly. In other words, where the circumstances alleged to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing

them to be true, they amount to a probable cause, is a question of law. When the facts bearing on that question are disputed, it is the duty of the Court to instruct the jury what facts, if established, will constitute a probable cause for the prosecution, and to submit to them only the question as to the existence of those facts. *Bulkeley v. Keteltas*, 6 N. Y. 384; *Besson v. Sothard*, 10 N. Y. 236; *Stewart v. Sonneborn*, 98 U. S. 187.

It is apparent from a reading of the record in this case that there was at no time any concession as to the existence of facts sufficient to constitute probable cause. On the contrary, the record discloses that the existence of those facts was continually disputed from the time of the hearing on the preliminary motion up to and including the time of the hearing of the testimony on probable cause. The record also discloses (R. 18) that the foundation was laid for the purpose of discrediting the officer's testimony in connection with probable cause. From the questions asked of the officer in what appeared to be the laying of a foundation for a contradiction, the trial justice undoubtedly felt that the existence of those facts was to be disputed.

This court has many times ruled to the same effect as in the above-quoted cases.

Davis v. United States, 16 Appeals D. C. 452;

Spitzer v. Friedlander, 14 App. D. C. 556, 562;

Staples v. Johnson, 25 App. D. C. 155, 160;

them to be true, they amount to a probable cause, is a question of law. When the facts bearing on that question are disputed, it is the duty of the Court to instruct the jury what facts, if established, will constitute a probable cause for the prosecution, and to submit to them only the question as to the existence of those facts. *Bulkeley v. Keteltas*, 6 N. Y. 384; *Besson v. Sothard*, 10 N. Y. 236; *Stewart v. Sonneborn*, 98 U. S. 187.

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Staples v. Johnson, 25 App. D. C. 155, 160;

Slater v. Taylor, 31 App. D. C. 104;
Brown v. Selfridge, 34 App. D. C. 242,
 224 U. S. 189;
United Cigar Stores v. Young, 36 App.
 D. C. 409;
Mark v. Rich, 43 App. D. C. 182;
Carroll v. Parry, 43 App. D. C. 377.

**RECEIVING IN EVIDENCE PERSONAL PROPERTY
 UNLAWFULLY SEIZED**

It is stated in appellants' brief that there was received in evidence against them property seized in their dwelling, which property the court under the preliminary motion had ruled unlawfully seized. That is a direct and absolute misstatement of fact, as disclosed by the record. (R. 17.) The property offered in evidence was that taken from the suitcase at the station house, and to which search, incidentally, one of the defendants had not only consented, but suggested. (R. 17.)

The cases cited by the appellants in support of this contention have no application here, because the property offered was legally seized. (R. 7, and verdict of jury.)

NO PROOF OF VALUE

It is seriously contended in the appellants' brief that there was no legal proof of value of the articles stolen.

The complainant in the case, Mrs. Elsbeth Gillespie, among other things, testified that she was the

proprietress of a ladies' wearing apparel shop on Connecticut Avenue. She testified further that Exhibit No. 1 cost her \$39.50 and that the selling price was \$65; that Exhibit No. 2 had cost \$29.50 and the selling price was \$49.50; that Exhibit No. 3 had cost \$35 and that the selling price was \$45. (R. 16, 17.)

Miss Margaret Gillespie testified that she was a manufacturer of women's and misses' dresses and had been in that business for some time. She testified also that she sold Exhibit No. 1 to Mrs. Elsbeth Gillespie and also Exhibit No. 2; that she could say definitely that the value of each was not under thirty or thirty-five dollars.

In the light of that testimony by two qualified persons, how can it be urged that there was no testimony as to value? The court specifically instructed the jury at the outset of the charge that this was a case of grand larceny, that is, for the theft of property whose value is alleged to be in excess of \$35. There was no charge asked for, on value, except a "stereotyped" request to instruct the jury that they should find the property was of nominal value. The appellee offers no dispute on the case of *Henry v. United States*, 49 App. D. C. 207, but suggests that case defeats the appellants' contention, because in this case there was an abundance of competent testimony of the type that the Henry case states is necessary.

CONCLUSION

It is urged that the record in this case discloses no error warranting a reversing of the judgment and the direction of a new trial, and therefore the judgment of the court below should be affirmed.

PEYTON GORDON,
United States Attorney.

WILLIAM H. COLLINS,
Assistant United States Attorney.

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